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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

_____ Term, _____

No. 74-110

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business as E. & E. J. Pfotzer,

Petitioners,

~~DORR-OLIVER, INC.; HOWARD DEAN;~~ ~~DONALD J. ST. JOHN;~~ MICHAEL WARHOLIC; and THE CITY OF NORWALK,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDMOND PFOTZER
and
E. JOHN PFOTZER
Petitioners pro se

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* Appendix page references with "a" are references to Second Circuit Appendix, filed herewith.

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STATUTES INVOLVED

Connecticut General Statutes:

"Sec. 52-279. When attachments may be granted. Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, both real and personal, and for want thereof against his body; provided no attachment shall be granted against the body in any tort action unless it is within the provisions of section 52-562, nor in any action unless execution against the body may issue therein, nor unless each cause of action in the complaint is such that execution may issue against the body of the defendant upon a judgment founded thereon. No attachment shall be made in any action for slander, libel or invasion of privacy except upon order of the court to which the writ is made returnable. No attachment shall be made against the real or personal property of any municipal official in any action against the municipality or its officials acting within the scope of their authority except upon order of the court to which the writ is returnable. No attachment shall be made against the real or personal property of a member of the state of any municipal police force in an action involving his conduct as a policeman except (1) when such policeman has been dismissed from the police force of which he was a member at the time of the incident which gave rise to the action or (2) upon order of the court to which the writ is returnable. No attachment shall be made against the real or personal property of any member, teacher

or employee, as defined by section 10-235, of any board of education, in any action against any board or commission as defined by said section or against any such member, teacher or employee involving his conduct as such member, teacher or employee, except upon order of the court to which the writ is returnable. (1967, P.A. 275, Sec. 2; 1967, P.A. 679; 1967, P.A. 837; 1969, P.A. 505.)"

"Sec. 52-280. Service of writ of attachment. A writ of attachment shall be served by attaching the estate of the defendant, personal or real, or both, and, if none can be found by attaching his person when liable to attachment. When the body of the defendant is attached, the officer shall read the writ and complaint in his hearing; and, in every case of attachment, the officer serving the process shall leave the person whose estate or body was attached, or at his usual place of abode, if within the state, a true and attested copy of the process and of the accompanying complaint, and of his return thereon, describing any estate attached. (1949 Rev., Sec. 8023.)"

"Sec. 52-281. Order for attachment on plaintiff's application during pendency of action. The plaintiff in any action which was or might have been commenced by attachment may, at any time during its pendency, apply in writing to the court to which it was brought, or, when such court is not in session, to any

judge thereof, for an order for the attachment or further attachment of the estate of the defendant; and the court or judge may, at its or his discretion, issue such an order, directed to a proper officer, stating the amount to be attached, and the time of return, which shall not be later than during the next term or session of such court; which order shall be served and returned in the same manner as an original writ of attachment and when returned shall become a part of the files and record in the action. The estate attached under such order shall be held to respond to the final judgment or decree in the same manner as if attached at the commencement of the action. (1949, Sec. 8069; 1959, P.A. 28, Sec. 179.)"

"Sec. 52-304. Dissolution of attachment by substituting bond or lien. When any estate is attached, or any debt or effects taken by process of foreign attachment, the defendant may apply in writing to the court in which such action may be pending, or any judge thereof, to dissolve the attachment lien upon the substitution of (a) a bond with surety; or (b) a lien on any other property of the defendant which has an equal or greater net equity value than the amount secured by such attachment. (1961, P.A. 517, Sec. 1.)"

"Sec. 52-329. Process of foreign attachment. When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so

that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. (1961, P.A. 280.)"

U. S. Constitution:

Amendment 14. Section 1.
(Citizenship - Due process of law - Equal Protection.)... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

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deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 1343 - See Appendix, 92a.
28 U.S.C. 2201 - See Appendix, 92a.
28 U.S.C. 2202 - See Appendix, 92a.
28 U.S.C. 2281 - See Appendix, 93a.
28 U.S.C. 2284 - See Appendix, 93a.
42 U.S.C. 1983 - See Appendix, 95a.

APPENDIX

JUDGEMENT APPEALED FROM SECOND CIRCUIT 1A

SUPREME COURT OF THE UNITED STATES

_____Term,_____

No. _____

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business as E. & E. J. Pfotzer,

Petitioners,

DORR-OLIVER, INC.; HOWARD DEAN; DONALD J. ST. JOHN; MICHAEL WARHOLIC; and THE CITY OF NORWALK,

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Petitioners Edmond Pfotzer and E. John Pfotzer respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1974.

OPINION BELOW

No opinion was rendered by the Court of Appeals. The opinions of the District Court, unreported, appear in the Appendix below, at 6a and 13a, filed herewith.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 14, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

ISSUES PRESENTED

1. Does a single U.S. District Court Judge lack jurisdiction to dismiss, or exceed his authorized jurisdiction in dismissing, a complaint seeking to enjoin, as repugnant to the U.S. Constitution, a State statute of statewide application ?

2. Does a single U.S. District Court Judge exceed his authorized jurisdiction in not granting a motion to convene a three-judge District Court panel to hear a complaint seeking to enjoin enforcement of state statutes of statewide application, where there is no doubtful question of state law involved?

3. Does a single District Court Judge lack jurisdiction to deny interlocutory injunction enjoining enforcement of a state statute of statewide application?

4. Is a complaint dismissible which seeks to declare a state statute of state-wide application repugnant to the U. S. Constitution?

STATUTES INVOLVED

Connecticut General Statutes:

"Sec. 52-279. When attachments may be granted. Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, both real and personal, and for want thereof against his body; provided no attachment shall be granted against the body in any tort action unless it is within the provisions of section 52-572, nor in any action unless execution against the body may issue therein, nor unless each cause of action in the complaint is such that execution may issue against the body of the defendant upon a judgment founded thereon. No attachment shall be made in any action for slander, libel or invasion of privacy except upon order of the court to which the writ is made returnable. No attachment shall be made against the real or personal property of any municipal official in any action against the municipality or its officials acting within the scope of their authority except upon order of the court to which the writ is returnable. No attachment shall be made against the real or personal property of a member of the state or any municipal police force in an action involving his conduct as a policeman except (1) when such policeman has been dismissed from the police force of which he was a member at the time of the incident which gave rise to the action or (2) upon order of the court to

which the writ is returnable. No attachment shall be made against the real or personal property of any member, teacher or employee, as defined by section 10-235, of any board of education, in any action against any board or commission as defined by said section or against any such member, teacher or employee involving his conduct as such member, teacher or employee, except upon order of the court to which the writ is returnable. (1967, P.A. 275, Sec. 2; 1967, P.A. 679; 1967, P.A. 837; 1969, P.A. 505.)"

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"Sec. 52-281. Order for attachment on plaintiff's application during pendency of action. The plaintiff in any action which was or might have been commenced by attachment may, at any time during its pendency, apply in writing to the court to which it was brought, or, when such court is not in session, to any judge thereof, for an order for the attachment or further attachment of the estate of

the defendant; and the court or judge may, at its or his discretion, issue such an order, directed to a proper officer, stating the amount to be attached, and the time of return, which shall not be later than during the next term or session of such court; which order shall be served and returned in the same manner as an original writ of attachment and when returned shall become a part of the files and record in the action. The estate attached under such order shall be held to respond to the final judgment or decree in the same manner as if attached at the commencement of the action. (1949, Sec. 8069; 1959, P.A. 28, Sec. 179.)"

"Sec. 52-304. Dissolution of attachment by substituting bond or lien. When any estate is attached, or any debt or effects taken by process of foreign attachment, the defendant may apply in writing to the court in which such action may be pending, or any judge thereof, to dissolve the attachment lien upon the substitution of (a) a bond with surety; or (b) a lien on any other property of the defendant which has an equal or greater net equity value than the amount secured by such attachment. (1961, P.A. 517, Sec. 1.)"

"Sec. 52-329. Process of foreign attachment. When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of

any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. (1961, P.A. 280.)"

U. S. Constitution:

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28 U.S.C. 1343 - See Appendix, 92a.*
28 U.S.C. 2201 - See Appendix, 92a.
28 U.S.C. 2202 - See Appendix, 92a.
28 U.S.C. 2281 - See Appendix, 93a.
28 U.S.C. 2284 - See Appendix, 93a.
42 U.S.C. 1983 - See Appendix, 95a.

STATEMENT

District Court jurisdiction derived from the 14th Amendment, 42 U.S.C. 1983, 28 U.S.C. 1343, 2201, 2202, 2281 and 2284.

On September 1, 1972, petitioners filed their initial complaint (2a, 25a) in the U. S. District Court for the District of Connecticut (Pfotzer v. Dorr-Oliver, Inc. et al., Civil No. B-587), superseded by their First Amended Complaint, filed (prior to Answer by defendants) October 30, 1972 (3a, 16a).

The Amended Complaint sought:

1. declaratory and injunctive relief pursuant to 42 U.S.C. 1983 and the 14th Amendment (par. 1, 16a) and per 28 U.S.C. 2201 and 2202 (par. 4, 17a);

2. determination of the action by a three-judge district court, pursuant to 28 U.S.C. 2281 and 2284 (par. 3, 16a-17a);

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* "a" references are to pages of Second Circuit Appendix, filed herewith.

3. injunction restraining defendants, including one defendant who is a state officer performing a state function from applying, enforcing and executing Sections 52-279, 52-280, 52-281, 52-329 and 52-304 of the General Statutes of the State of Connecticut on the ground that they violate the due process and equal protection provisions of the 14th Amendment (par. 3, 16a-17a);

4. declaratory judgment declaring Sections 52-279, 52-280, 52-281 and 52-304 of the Connecticut General Statutes are unconstitutional facially and as applied, and are in violation of the due process and equal protection provisions of the 14th Amendment (par. 4, 17a).

The complaint* set out that:

Defendant** Dorr-Oliver, Inc., had sued the petitioners herein in a state court action (Dorr-Oliver, Inc., v. Edmond Pfotzer and E. John Pfotzer, Superior Court, Connecticut (Stamford), Docket No. 17,975) (Complaint, par. 6; 18a), and that, prior to the institution of the said action, Dorr-Oliver, Inc., attempted to garnish the sum of about $22,000.00 ostensibly in the hands of the defendant City of Norwalk, which was funds ostensibly owed to petitioners by the City of

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* All future references to "Complaint" will mean the First Amended Complaint.

** All future references to "Defendant" will be reference to defendants in the District Court Action (B-587).

Norwalk for work performed under a contract. (Complaint, par. 10; 18a);

The garnishment was executed by a state officer, defendant Michael Warholic, a Deputy Sheriff of Fairfield County, Connecticut, and was issued prior to commencement of the action by defendant Howard Dean*, attorney for defendant Dorr-Oliver, Inc., in his capacity, ex-officio**, as a Commissioner of the Superior Court of the State of Connecticut (Complaint, par. 8; 18a);

The said garnishment was issued and executed prior to the commencement of the state court litigation (Complaint, par. 12; 19a);

As a result of said attempted garnishment on the City of Norwalk, the said City of Norwalk ostensibly withheld approximate sum of $22,000.00 due to petitioners for performance of a contract with the said City of Norwalk, the said sum being withheld ostensibly from petitioners since November 30, 1971

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* Defendant Donald J. St. John was later substituted as attorney for Dorr-Oliver, Inc., in the place and stead of Defendant Howard Dean (Complaint, par. 9, 18a).

** It appears that, in Connecticut, a licensed attorney was authorized to issue a pre-litigation writ of attachment as a Commissioner of the Superior Court under now judicially void Gen. Stat. Sec. 52-329.

(Complaint, par. 14, 15; 19a-20a)*;

The said garnishment was obtained under the provisions of Connecticut General Statutes, Sec. 52-329, which permitted a pre-litigation attachment to be issued by the attorney for the plaintiff, without requiring a court order or any other additional judicial sanction or intervention

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* It is significant to note that on November 30th, 1969, the date of service of attachment upon defendant herein, City of Norwalk, the City had in fact, upon October 20th, 1969, in answer to plaintiffs' complaint in Civ. No. 13326 filed in the U. S. D. C. for the State of Connecticut, denied it owed plaintiffs money, and contrariwise asserted a counter-claim of $110,000.00. Such specific denial to the Court rendered void (futile) the November 30th, 1969, attachment supra, served upon the City. The City, at all times material to its withholding of plaintiffs $22,000.00, supra, knew in truth, after its October 20th, 1969 denial, that it could not satisfy said garnishment, supra. The record shows the defendant City of Norwalk affirmatively avoided disclosing to the Superior Court of Connecticut (p. 5 supra) its denial of plaintiffs' claims in Civ. 13326 supra and its $110,000.00 counter-claim therein.

(Complaint, par. 11, 12, 18; 19a, 21a)*;

After the petitioners had commenced their action in the U.S. District Court, and prior to the determination by the three-judge court in Lynch that Sec. 52-329 was unconstitutional, Dorr-Oliver, Inc., moved for a substitute garnishment under the provisions of Connecticut General Statutes Sec. 52-281 to replace the garnishment under Sec. 52-329 on its stated plea that said Sec. 52-329 was unconstitutional and, on the granting of the said application, simultaneously released its garnishment under Sec. 52-329 and issued and executed the garnishment under Sec. 52-281 (Complaint, par. 20, 21; 21a-22a);

The State Court hearing of the motion for the said substitute garnishment was not a hearing upon the merits of Dorr-Oliver's claim against petitioners, nor was there a 'probable cause' hearing held (Complaint, par. 22; 22a);

Petitioners have had their property seized, they have been denied the equal protection of the laws of the State of Connecticut, and the seizure was made prior to litigation without any opportunity for a court hearing of 'probable validity' as to the merits of the state court complaint in respect to either garnishment levied under Sec. 52-329 and under Sec. 52-281 (Complaint, par. 22, 23 and 24; 22a-23a);

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* This statute has been declared unconstitutional by a three-judge district court in Lynch v. Household Finance Corp. (D. C. Conn. 1973), F. S. (on remand from the Supreme Court, 405 U.S. 538, after dismissal by the U.S. District Court).

Petitioners have no adequate remedy in the state courts of Connecticut, have no adequate remedy at law and will suffer irreparable injury unless enforcement of the subject statutes is restrained (Complaint, par. 25; 23a).

The "Wherefore" clause (23a-24a) prayed that:

1. The U.S. District Court assume jurisdiction;

2. A three-judge court be convened, pursuant to provisions of Title 28 U.S.C., Sec. 2281 and 2284;

3. A declaratory judgment be entered, pursuant to 28 U.S.C. 2201 and 2202 and Rule 57, FRCP, declaring the cited Connecticut General Statutes to be unconstitutional on their face and as applied;

4. A permanent injunction be entered restraining the defendants, including the Deputy Sheriff, from enforcing the attachment of plaintiffs-petitioners' property created by the said writs of attachment, or from action under the color of authority of Sections 52-329, 52-280, 52-304, and 52-279 of the Connecticut General Statutes, including the said substitute garnishment;

5. A mandatory injunction be entered directing the defendants in the District Court action to release the said attachments and to permit the monies

attached* thereunder to be paid to petitioners herein;

6. A judgment be entered in favor of the petitioners in the sum of $25,000.00 as petitioners' damages;

7. Petitioners have such other, further and different relief as the court shall deem just and proper (Complaint, "Wherefore" Clause; 23a-24a).

Without answering, the motion to dismiss was filed on September 22, 1972 (Docket entries, 2a; 38a).

On September 20, 1972, petitioners filed a motion for preliminary injunction (Docket entries, 2a; 31a).

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* As set forth in second footnote on bottom of page 6 : Note that on November 30, 1969, the date the attachment (garnishment) was served on defendant City of Norwalk, the City had already denied in its answer to the U.S.D.C. for State of Connecticut, that it owed money to plaintiffs, thus additively negating any basis for the City to withhold any funds on the basis of the attachment, as stemming from the June 2, 1972 judgment.

On November 16, 1972, an order was entered denying petitioners' motion for preliminary injunction and the court stayed further proceedings until a decision was handed down by the three-judge district court in Lynch v. Household Finance Corp. (Civil Nos. 13,737 and 13,738, District of Connecticut). (3a; Opinion, 13a).

On February 6, 1973, petitioners cross-moved the U.S. District Court (Docket entries, 3a; 60a);

1. To vacate the stay of further proceedings;

2. To convene a three-judge court to hear the complaint;

3. Renewing petitioners' motion for a preliminary injunction;

4. To designate petitioners as members of the class of plaintiffs within the class in Lynch v. Household Finance Corp. (U.S. D.C. Conn. Civil Nos. 13,737, 13,738);

5. For summary judgment.

On May 11, 1973, the District Court filed its decision granting the motion to dismiss (Docket entries, 4a; Opinion, 6a).

On May 21, 1973, petitioners moved the District Court for re-argument of the dismissal motion (Docket entries, 4a; 90a), which motion was denied June 25, 1973.

Final judgment was entered on May 25, 1973 (Docket entries 4a; 5a).

Petitioners appealed to the Second Circuit Court of Appeals (No. 73-1884) from the District Court judgment of dismissal and from denial of petitioners' motions for temporary injunction and summary judgment.

The Second Circuit affirmed, without opinion (1A*), May 14, 1974.

REASONS FOR GRANTING THE WRIT

1. The Court below has so far deviated from this Court's declared doctrine as to call for the exercise of this Court's supervisory power over the federal judiciary.

2. The decision below is in conflict with this Court's prior decision in Ex Parte Fahey (1947), 332 U.S. 258, and Idlewild Liquor Corp. v. Epstein (1962), 370 U.S. 713.

ARGUMENT

POINT I

PETITIONERS' 42 U.S.C. 1983 COMPLAINT SEEKING INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTES OF STATE-

* "A" references are to pages of the Appendix annexed hereto.

WIDE APPLICATION, WHERE NO DOUBTFUL QUESTION OF STATE LAW WAS INVOLVED, PRESENTED A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION AND MANDATED CONVENING A THREE-JUDGE DISTRICT COURT PANEL.

Ex Parte Fahey (1947), 332 U.S. 258.

Idlewild Liquor Corp. v. Epstein (1962), 370 U.S. 713.

In Epstein, supra, as herein, petitioners sued in a Federal District Court for a judgment declaring a statute, as applied, was repugnant to the Constitution and asked for an injunction against its enforcement.

A request for a three-judge court under 28 U.S.C. 2281, 2284, was denied (but the single District Court judge in Epstein retained jurisdiction of the cause in order to give the State Courts an opportunity to pass upon the constitutional issues presented, although there was no state litigation then pending).

This Court, in Epstein, granted certiorari and a motion for leave to file a petition for a writ of mandamus (at P. 715 of 370 U.S.), saying:

> "We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a District Court, the court's inquiry is appropriately limited to determine

> whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise, is within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief."

Additionally, although the District Court considered this Court's holding in Mitchum v. Foster (1972), 407 U.S. 225, the District Court refused to apply the principles therein set forth, holding "that very decision emphasized that a section 1983 suit does not qualify in any way 'the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.' Id. at 243."

In so holding, the District Court disregarded that the main thrust of plaintiffs' amended complaint was to enjoin enforcement of a state statute of state-wide application and that the main thrust was not, as the Court indicated, to restrain a state court proceeding.

Having so misinterpreted plaintiffs' legal posture, the District Court refused to apply this Court's holding in Mitchum that section 1983 suits are excepted from the literal strictures of Section 2283.

The District Court also appears to rely, in dismissing, on the precept that "it is not entirely clear that some form of state court interlocutory review is not available to the plaintiffs. Finally, there is some reason to believe that the Connecticut General Assembly will accept the responsibility given it by Fuentes v. Shevin... and will legislate to eliminate the recurring questions in this field. In these circumstances, federal court intervention to review the sufficiency of a hearing in a pending state court litigation is unwarranted."; thus relying on unacceptable standards on which to predicate its dismissal of petitioners' complaint.

The mere statement of the proposition that remote prospective state court review* or equally remote possible state legislation is an adequate substitute for federal intervention to correct enforcement of unconstitutional state statutes demonstrates, clearly and unequivocally, the fallacy of the proposition, emphasized by the observation footnoted below re non-reviewability of interlocutory orders until after final judgment.

The District Court then went on to point out that Lynch v. Household Finance Corp. (D. C. Conn. 1973), F. S. , has settled the unconstitutionality of one statute under attack, Section 52-329, and then holds that petitioners' attack on Sec-

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* In Connecticut, review of interlocutory orders is not available, only final orders and judgments are reviewable. Conn. Gen Stat., Section 52-263.

tion 52-281 does not require a three-judge court, and, erroneously, the court contends that "since plaintiffs are not seeking to enjoin enforcement of the statute (Section 52-281), but simply challenging the sufficiency of a particular hearing held pursuant to that statute," thus ignoring the clear language of petitioners' complaint.

Compare Farley v. Farley (3rd Cir. 1973), F. 2d (opinion No. 71-1967, filed June 25, 1973), where the Third Circuit held that, on application for a three-judge district court, the single district court judge is limited to determining whether a substantial federal question and a basis for equitable relief are alleged, the court further holding that a claim is insubstantial only if its unsoundness so clearly results from previous court decisions as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.

See, also, Hannis Distilling Co. v. City of Baltimore (1910), 216 U.S. 285, 288.

While this Third Circuit ruling would characterize petitioners' attack on Sec. 52-329 (as unconstitutional) as insubstantial (since a three-judge court had already declared it unconstitutional but not this court) the characterization would not apply to petitioners' claim for equitable injunctive relief restraining "enforcement" of said Sec. 52-329, nor would it bar petitioners' claims of unconstitutionality re Sec. 52-281 and the other sections, as they have not yet been the subject of U.S. Supreme Court decisions.

Hannis, supra.

It is respectfully submitted that the District Court erred in concluding that abstention was not warranted in respect to plaintiffs' claims and should not be exercised and plaintiffs' equitable claims should be dismissed.

In what is deemed to be further error, the District Court also deemed plaintiffs' claims for money damages to warrant dismissal, and apparently only for the reason that the civil rights claims for injunctive relief were dismissed.

POINT II

THE SINGLE DISTRICT COURT JUDGE EXCEEDED HIS AUTHORIZED JURISDICTION IN DENYING PETITIONERS' MOTION FOR INTERLOCUTORY INJUNCTION ENJOINING ENFORCEMENT OF STATE STATUTE OF STATE-WIDE APPLICATION.

The rationale that applies, clearly, to actions to enjoin enforcement of state statutes deemed repugnant to the federal constitution applies with equal vigor to applications within the action for temporary injunction seeking the same relief as does the complaint.

Stratton v. St. Louis S. W. Ry. (1930), 282 U.S. 10, 15, 18.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the U. S. Court of Appeals for the Second Circuit.

Respectfully submitted,

EDMOND PFOTZER

and

E. JOHN PFOTZER

Petitioners pro se

Edmond Pfotzer

E. John Pfotzer

JUDGMENT APPEALED FROM

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge:

HON. PAUL R. HAYS

HON. JAMES L. OAKES

Circuit Judges.

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business as E. & E. J. PFOTZER,
Plaintiffs-Appellants,

v.

DORR-OLIVER, INC., DONALD J. ST. JOHN, MICHAEL WARHOLIC, and THE CITY OF NORWALK,
Defendants-Appellees.

73-1884

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s: IRVING R. KAUFMAN

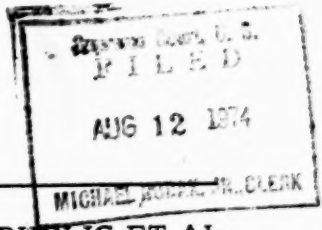
PAUL R. HAYS

JAMES L. OAKES

SUPREME COURT OF THE UNITED STATES

Oct. Term, 1974

No. 74-110



PFOTZER ET AL ETC. V. WARHOLIC ET AL

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDMOND PFOTZER
and
E. JOHN PFOTZER
Petitioners pro se

P. O. Box 987
Wilmington, Delaware 19899

Tel. (302) 571-0595

JUDGMENT APPEALED FROM

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-four.

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Circuit Judges.

EDMOND PFOTZER and E. JOHN PFOTZER,
Individually and as co-partners doing
business as E. & E.J. PFOTZER,
Plaintiffs-Appelants,

v.

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MICHAEL WARHOLIC, and
THE CITY OF NORWALK,
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73-1884

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s: IRVING R. KAUFMAN

PAUL R. HAYS

JAMES L. OAKES

FILED
May 11 9:37 AM '73

CLERK
U. S. District Court
Bridgeport, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

EDMOND PFOTZER and E. JOHN PFOTZER Individually and as Co-Partners d/b/a E. & E. J. PFOTZER	)	
vs	)	Civil B-587
DORR-OLIVER, INC. HOWARD DEAN DONALD J. ST. JOHN MICHAEL WARHOLIC and THE CITY OF NORWALK	)	

JUDGMENT

This case having come on for hearing on Defendants' Motion to Dismiss and the Court having rendered its Ruling on Motion to Dismiss under date of May 11, 1973, granting Defendants' Motion,

It is ORDERED, ADJUDGED AND DECREED that this action be and is hereby dismissed, with costs to the Defendants.

Dated at Bridgeport, Connecticut this 25th day of May, 1973.

SYLVESTER A. MARKOWSKI, Clerk

By: (Sgd) VINCENT R. DE ROSA
Deputy-in-Charge

OPINION - GRANTING DISMISSAL MOTION

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EDMOND PFOTZER, ET AL :

V. : Civil No. B-587

DORR-OLIVER, INC., ET AL :

MEMORANDUM OF DECISION
ON DEFENDANTS' MOTION TO DISMISS

Defendants have moved to dismiss this suit, brought pursuant to 42 U.S.C. Sec. 1983, challenging the garnishment by the defendant, Dorr-Oliver, Inc., of plaintiffs' debtor in connection with state court litigation brought by Dorr-Oliver against plaintiffs. Though much of the controversy in this area has been resolved by the decision of the three-judge district court in Lynch v. Household Finance Corp., ___F. Supp. ___(D. Conn. Jan. 12, 1973), which declared unconstitutional Connecticut's pre-judgment garnishment statute, Conn. Gen. Stat. Sec. 52-329, this case nevertheless presents its own special complications.

On November 30, 1971, counsel for Dorr-Oliver issued a writ of attachment against property of the plaintiffs in initiating an action in the Superior Court for Fairfield County against the Pfotzers for alleged non-payment of funds owed in connection with a sale of

equipment. The writ was served upon the defendant, City of Norwalk, to garnish funds of the City which were owed to the Pfotzers. This pre-judgment garnishment was vulnerable to constitutional attack for the reasons ultimately set forth in Lynch. Alerted to the vulnerability of its garnishment by Snaidach v. Family Finance Corp., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972), Dorr-Oliver moved in the Superior Court for a substitute garnishment pursuant to Conn. Gen. Stat. Sec. 52-281. That statute permits any plaintiff to move for an order of attachment or further attachment during the "pendency" of a state court action that was or might have been commenced by attachment. The motion sought a court order authorizing a garnishment upon the Pfotzers' property in the possession of the City of Norwalk in an amount equal to the amount then subject to the prior garnishment. The motion requested that the court order for the substitute garnishment be contingent upon release of the prior garnishment. The Pfotzers filed in the Superior Court an "objection" to Dorr-Oliver's motion.

On October 26, 1972, Dorr-Oliver's motion was heard in the Superior Court by Judge Tierney. E. John Pfotzer, who has been appearing pro se in this Court and in the state court, attended the hearing and presented oral argument. Judge Tierney

granted the motion for substitute garnishment. Dorr-Oliver then released the original garnishment, and counsel for Dorr-Oliver issued a new writ directing the sheriff to "garnish the City of Norwalk to the value of $22,175 the goods or estate of Edmond Pfotzer and E. John Pfotzer." The release and new garnishment were served by the sheriff.

Plaintiffs in this Court attack the second garnishment on the ground that the hearing before Judge Tierney did not comply with Lynch because they were denied the opportunity to litigate any aspect of the merits of Dorr-Oliver's claim against them and that, as a result, the state court gave no consideration to the necessity for the second garnishment. The Pfotzers also claim the second garnishment is constitutionally defective because it is a "continuation" of the first garnishment, which they allege is defective under Lynch. Plaintiffs ask to be designated as members of the Lynch class to secure relief.

Defendants move to dismiss on the ground that the first garnishment, having been released, is no longer subject to attack, and that the second garnishment, having been obtained after a state court hearing, is not vulnerable to attack under Lynch. On November 16, 1972, all proceedings in this case were stayed pending decision by the three-judge court in Lynch. Plaintiffs' motion to vacate that stay is granted.

The contentions of the defendants do not necessarily entitle them to dismissal. If the merits of this dispute were to be considered by this Court, plaintiffs would be entitled to prove their contention that the second garnishment was obtained without the underlying claim being tested in a "fair prior hearing." Fuentes v. Shevin, supra, 407 U.S. at 96. The fact that the Pfotzers had notice of the hearing and were permitted to appear does not refute their due process argument, if in fact, as they seem to allege, they were denied all opportunity to litigate whether the Dorr-Oliver claim had any merit. Moreover, the release of the first garnishment does not necessarily end the controversy, if, as the plaintiffs allege, the first garnishment served, in effect, as the basis for the second garnishment.

Though plaintiffs' claims thus have the sufficiency to withstand a motion to dismiss, they nonetheless encounter a special obstacle that requires dismissal. Plaintiffs' Federal suit seeks a determination of the constitutionality of a decision reached in a pending state suit. Even if the state court hearing that preceded the granting of Dorr-Oliver's motion for a second garnishment was constitutionally deficient, correction of that alleged error would require injunctive or declaratory relief with respect to a pending state court proceeding. In Lynch the Supreme Court was careful to note that the garnishment there attacked was accomplished by persons "not proceeding under a court's supervision" using sheriffs who were

"not acting pursuant to a court order," and that the garnishment occurred before the state court defendant had been served with process. For these reasons the Court concluded that the injunction suit attacking the garnishment was not barred by the anti-injunction statute, 28 U.S.C. § 2283. Lynch v. Household Finance Corp., supra, 405 U.S. at 554-55. Despite the fears of the dissenters, id. at 559, the Court did not reject Hill v. Martin, 296 U.S. 393 (1935), but emphasized language from Hill stating that a federal court is forbidden to enjoin "all steps taken in the state court . . . from the institution to the close of the final process." Lynch at 555 (emphasis original). It seems clear that the Court would have viewed a federal suit attacking the second garnishment here as barred by § 2283.

It is true that the Court has subsequently decided that suits under § 1983 are excepted from the literal strictures of § 2283, Mitchum v. Foster, 407 U.S. 225 (1972), but that every decision emphasized that a § 1983 suit does not qualify in any way "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Id. at 243. The Court has not yet decided how rigorously these principles are to apply when federal injunctive relief is sought against state civil proceedings, although three members of the Court have stated that the relevant considerations, outlined in a suit attacking state criminal proceedings, Young-

er v. Harris, 401 U.S. 37 (1971), are "equally applicable where state civil litigation is in progress." Lynch v. Household Finance Corp., supra, 405 U.S. at 561 (dissenting opinion).

Even if the Younger principles apply to state civil litigation with somewhat reduced force, they are sufficent to bar federal court intervention in the state proceeding at issue in this case. No sensitive First Amendment issues are involved, cf. Dombrowski v. Pfister, 380 U.S. 479 (1965), and the merits of Dorr-Oliver's underlying claim will not only be tested but resolved in the pending state court action. Moreover, it is not entirely clear that some form of state court interlocutory review is not available to the plaintiffs. Finally, there is some reason to believe that the Connecticut General Assembly will accept the responsibility given it by Fuentes v. Shevin, supra, and will legislate to eliminate the recurring questions in this field. In these circumstances, federal court intervention to review the sufficency of a hearing in a pending state court litigation is unwarranted.

Plaintiffs have sought a three-judge Court under 28 U.S.C. § 2281, and were one required, a one judge court could not dismiss on Younger grounds, Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971). However, Lynch has settled the unconstitutionality of § 52-329, and, but for the Younger problem, a one-judge court could determine whether plaintiffs were properly

within the Lynch class and if so, accord appropriate relief. Plaintiffs attack on § 52-281, under which Dorr-Oliver obtained the second garnishment, does not require a three-judge court, since plaintiffs are not seeking to enjoin enforcement of the statute, but simply challenging the sufficiency of a particular hearing held pursuant to that statute. Cf. Wallace v. Johnson, Civ. No. 14,499 (D. Conn. Nov. 26, 1971). Since plaintiffs' claims do not require a three-judge court to consider their merits, Abele does not preclude a one-judge court from considering abstention.

Younger considerations do not warrant the type of abstention that would postpone federal court consideration of the federal claim, but rather dismissal, since the federal claim is to be raised and adjudicated in the state court, subject only to Supreme Court review. See Hart and Wechsler, The Federal Courts and the Federal System 1043 (2d ed. 1973). Since the equitable jurisdiction of this Court should not be exercised, the equitable claims should be dismissed. See Samuels v. Mackell, 401 U.S. 66, 73 (1971) (approving dismissal as a remedy where Younger considerations are applicable).

In addition to their claim for injunctive relief, plaintiffs seek damages, but this claim also warrants dismissal. Even if plaintiffs prevailed on the merits of their attack on both garnishments, damages would not be awarded. The defendants obtained the first garnishment under a statute valid at the time they acted, and any infirmity in the second garnishment

stems from the alleged inadequacy of the hearing in the state court. Even if the hearing was deficient, defendants would in no event have to respond in damages for acting in good faith upon a court order they believed they had validly obtained.

Accordingly, the defendants' motion to dismiss is granted.

Dated at New Haven, Connecticut, this 10 day of May, 1973.

JON O. NEWMAN
Jon O. Newman
United States District Judge

FILED
Nov. 16 10:00 AM '72

CLERK
U. S. District Court
Bridgeport, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

ALLIED CORK, INC.)

V.) CIVIL ACTION NO. B-592

ROESSLER PACKING COMPANY, INCORPORATED, CARL ROESSLER, INCORPORATED, and ROESSLER PACKING COMPANY OF BRIDGEPORT, INC.)

JOSEPH KAVANEWSKY and GREEN VALLEY LAKES, INC., individually and on behalf of all other persons similarly situated)

V.) CIVIL ACTION NO. B-593

GREATER DEVELOPMENT COMPANY OF CONNECTICUT, INC.; RAY CLARK d/b/a/ PORT CONSTRUCTION COMPANY; DAVID E. KAMINS, individually and as representative of the Commissioners of the Superior Court of the State of Connecticut)

EDMOND PFOTZER AND E. JOHN PFOTZER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS E. & E. J. PFOTZER)

V.) CIVIL ACTION NO. B-587

DORR-OLIVER, INC.; HOWARD DEAN; DONALD J. ST. JOHN; MICHAEL WARHOLIC; AND THE CITY OF NORWALK)

OPINION - DENYING TEMPORARY INJUNCTIVE RELIEF

In these three unrelated cases challenging the constitutionality of Connecticut's prejudgment attachment and garnishment statutes, Conn. Gen. Stats. § 52-279 et seq., § 52-329 et seq., motions have been filed to remove the various attachments and garnishments currently in effect. Plaintiffs in No. B-593 and No. B-587 and defendants in No. B-592 allege that the statutes are unconstitutional in failing to provide for prior notice and hearing. They rely on Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972). The garnishment in No. B-592 arose in connection with a suit originally filed in this Court, whereas No. B-593 and No. B-587 challenge garnishment and attachments in connection with pending state court actions.

None of the movants has shown sufficient threat of irreparable injury to warrant temporary injunctive relief.

Moreover, the issue on the merits in each of these cases appears to be substantially similar to the issue which is now sub judice before a three-judge court in this District in Lynch v. Household Finance Corporation, Civ. Nos. 13737, 13738, upon remand from the Supreme Court, 405 U.S. 538 (1972). Since plaintiffs in Lynch sought class action designation, it seems appropriate to stay these proceedings until Lynch has been decided. At that point it can be deter-

OPINION - DENYING TEMPORARY INJUNCTIVE RELIEF

mined whether these parties are appropriately within whatever classes of plaintiffs and defendants are designated in the Lynch litigation.

Accordingly, in No. B-593 and No. B-587 the motions for temporary injunctive relief are denied, and all further proceedings are stayed pending decision by the three-judge court in Lynch v. Household Finance Corporation, supra. In No. B-592 the motion to discharge the garnishment is denied.

Dated at Hartford, Connecticut, this 15 day of November, 1972.

JON O. NEWMAN
Jon O. Newman
United States District Judge